Supreme Court, U.S.
FILED
JAN 18 1996
CLERK

(3)

No. 95-902

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

SOMERSET COUNTY, MARYLAND,
Petitioner,

v.

GEORGE JOSEPH ARAVANIS,
Respondent.

On Petition For a Writ of Certiorari To The Court of Appeals of Maryland

REPLY TO BRIEF IN OPPOSITION

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REPLY ARGUMENT

Without so much as a mention of the merits of the civil forfeiture excessive fines issue presented to this Court, respondent devotes his entire brief in opposition to the questions whether an independent state law ground supports the judgment below and whether this Court should take this case to decide the applicability *vel non* of the Excessive Fines Clause to the several States. Respondent's resounding silence on the question presented by the petition can only be taken as a tacit

concession that the issue is, indeed, worthy of this Court's review. The independent state ground issue is easily resolved by consulting this Court's decision last year in *Arizona v. Evans*, 115 S. Ct. 1185 (1995), which respondent inexplicably overlooks. The question of the applicability of the Excessive Fines Clause to the States, on which petitioner and respondent are in absolute agreement, provides yet another reason to grant, not deny, review.

I.

THE JUDGMENT OF THE COURT OF APPEALS OF MARYLAND DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND.

Ignoring the plain language of the opinion below, respondent first argues that the Court of Appeals of Maryland's decision rests on an adequate and independent state law ground. Respondent initially asserts that state courts should be left free to interpret their state constitutions. (Brief in Opp. at 3). Respondent next contends that the court below based its decision on a state, not federal, provision and made clear that the federal cases it looked to were used only for guidance and did not compel the result the court reached. (*Id.* at 4-5). Although the state court certainly was free to interpret Maryland's Declaration of Rights provision governing excessive fines to extend greater rights than its federal counterpart, it is absolutely clear that the court did not do so. Consistent with its practice over the past century, the

state supreme court followed federal law because it felt compelled to do so. Rather than look to federal cases simply for guidance, it looked to such cases as binding precedent. Thus, the decision of the Maryland high court does not rest upon an adequate and independent state law ground.

This Court's pronouncement last year in *Arizona v. Evans* provides the framework for analysis of jurisdictional claims such as the one made by respondent. In that case, the Court adhered to the standard adopted in *Michigan v. Long*, 463 U.S. 1032 (1983):

> When "a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so."

115 S. Ct. at 1189, *quoting Long*, 463 U.S. at 1040-41. Even a cursory reading of the opinion of the court below shows that the decision is based on federal law, is interwoven with it, and is controlled by it. Even more plain is the conclusion that the Maryland state court decided the case the way it did because of its interpretation of the Eighth Amendment's Excessive Fines Clause.[1]

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[1] In resolving this issue, the Court need only ask itself "whether the same judgment would be rendered by the state court after the Court has corrected any error in its view of

(continued...)

To be sure, the Court of Appeals began its discussion of the excessive fines issue by reference to the state counterpart to the Eighth Amendment, Article 25 of the Maryland Declaration of Rights. (Pet. for Cert. App. 14a). The court immediately went on to state, however, that the state and federal provisions are "textually and historically, substantially identical," (*id.* 14a-16a), noting that both were taken virtually verbatim from the English Bill of Rights of 1689, (*id.* 16a). After pointing out that the excessive fines provision of the Maryland Declaration of Rights served as a model for its counterpart in the Eighth Amendment, the court concluded: "Thus, the excessive fines provision of Article 25 should be interpreted co-extensively with the excessive fines provision of the Eighth Amendment." (*Id.*).

If this were not a plain enough statement that Article 25 provides no greater protections than does the Eighth Amendment and that federal law controlled the outcome of the case, the court went on to discuss this Court's decision in *Austin v. United States*, 113 S. Ct. 2801 (1993), as well as the numerous federal and state court cases decided in *Austin's* wake. (Pet. for Cert. App. 16a-26a). All of these cases, of course, apply the federal law of the Eighth Amendment. The Maryland court concluded its discussion of the law with a most telling declaration:

> The requirements of the Excessive Fines Clause

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[1](...continued)
federal law." ROBERT L. STERN ET AL., SUPREME COURT PRACTICE § 3.24, at 152 (7th ed. 1993). Because the same judgment would not have been rendered in this case absent the state court's erroneous construction of the Eighth Amendment, the decision did not rest on an adequate state law ground.

> of the Eighth Amendment and, ***hence***, of Article 25 of the Maryland Declaration of Rights, mandate that recognition and effect be given to the use of the word "excessive" in that clause and to the *Austin* court's holding that a civil forfeiture is punishment.

(Pet. for Cert. App. 26a) (emphasis added). There could be no plainer statement that the Maryland court felt compelled to reach its decision as a matter of federal constitutional law and was not merely looking to federal decisions for purposes of guidance.

That the court in this case construed a provision of Maryland's Declaration of Rights co-extensively with a federal counterpart is nothing new in this State. Indeed, the Maryland courts have long done so in an unbroken line of cases. Typical of the Court of Appeals of Maryland's statements is the following: "We have consistently considered guarantees in the Declaration of Rights to be in *pari materia* with similar provisions of the federal constitution. Thus, we apply the same standards whether the claim alleges violation of a state or federal constitutional right." *Ogrinz v. James*, 309 Md. 381, 395 n.3, 524 A.2d 77, 84 n.3 (1987). Judge Charles E. Moylan, Jr. has echoed this sentiment for the Court of Special Appeals of Maryland: "As a practical matter, [provisions of the Maryland Declaration of Rights] are never used. Substantively, moreover, they are redundantly coterminous with their federal counterparts." *Hof v. State*, 97 Md. App. 242, 250, 629 A.2d 1251, 1255 (1993), *aff'd*, 337 Md. 581, 655 A.2d 370 (1995).

Cases dating back to 1883 express the same sentiment. *See, e.g., Lanasa v. State*, 109 Md. 602, 611-12, 71 A. 1058, 1062 (1909); *Blum v. State*, 94 Md. 375, 382, 51 A.

26, 29 (1902); *Baltimore Belt R.R. Co. v. Baltzell*, 75 Md. 94, 98-99, 23 A. 74 (1891); *Foote v. State*, 59 Md. 264, 268 (1883). Over the years, the courts of Maryland have ruled that numerous rights contained in the Declaration of Rights and the federal constitution are coterminous and are to be construed *in pari materia*. For example, the Fourth Amendment protection against unreasonable searches and seizures and the comparable right contained in Article 26 of the Declaration of Rights are identical. *See, e.g., Livingston v. State*, 317 Md. 408, 410, 564 A.2d 414, 415-16 (1989); *Trusty v. State*, 308 Md. 658, 661 n.1, 521 A.2d 749, 750 n.1 (1987); *State v. Smith*, 305 Md. 489, 513 n.9, 505 A.2d 511, 523 n.9, *cert. denied*, 476 U.S. 1186 (1986). The privilege against self-incrimination found in the Fifth Amendment and Article 22 are the same. *See, e.g., Hof v. State*, 337 Md. 581, 586 n. 3, 655 A.2d 370, 373 n. 3 (1985); *Adkins v. State*, 316 Md. 1, 7 n.5, 557 A.2d 203, 206 n.5 (1989); *In re Maurice M.*, 314 Md. 391, 393, 550 A.2d 1135, 1136 (1988), *rev'd on other grounds sub nom. Baltimore City Dep't of Social Services v. Bouknight*, 493 U.S. 549 (1990). And the right to be free from cruel or unusual punishments guaranteed by both the Eighth Amendment and Article 25 are coterminous. *See, e.g., Thomas v. State*, 333 Md. 84, 102 n.5, 634 A.2d 1, 10 n.5 (1993); *Minor v. State*, 313 Md. 573, 589 n. 4, 546 A.2d 1028, 1035 n.4 (1988) (concurring opinion); *Harris v. State*, 312 Md. 225, 237 n.5, 539 A.2d 637, 642 n.5 (1988). *See also Craig v. State*, 322 Md. 418, 430, 588 A.2d 328, 334 (1991), *on remand from Maryland v. Craig*, 497 U.S. 836 (1990) (right to confrontation in Sixth Amendment and Article

21 *in pari materia*); *Maryland Dep't of Human Resources v. Bo Peep Day Nursery*, 317 Md. 573, 601 n.7, 565 A.2d 1015, 1029 n.7 (1989) (right to due process in Fourteenth Amendment and Article 24), *cert. denied*, 494 U.S. 1067 (1990); *Parren v. State*, 309 Md. 260, 263, 523 A.2d 597, 598 (1987) (right to counsel in Sixth Amendment and Article 21); *WBAL-TV Div., Hearst Corp. v. State*, 300 Md. 233, 243 n.4, 477 A.2d 776, 781 n.4 (1984) (right to free speech in First Amendment and Article 40); *Montgomery County v. Schooley*, 97 Md. App. 107, 114, 627 A.2d 69, 73 (1993) (rights of legislators in Speech or Debate Clause of Article I, § 6 and Article 10).

In sum, given the long history in Maryland of construing analogous state and federal rights to be identical, together with the language expressly so stating in the present case, there can be no doubt that federal law compelled the result here. The decision is therefore not insulated from this Court's review merely because the court eschewed exclusive reliance on the Eighth Amendment in deciding the case. Were it otherwise, a state court could evade review of this or any federal question simply by mentioning the counterpart state right, notwithstanding that the state right is totally controlled by reference to federal law.

II.

THIS COURT CAN AND SHOULD DECIDE WHETHER THE EXCESSIVE FINES CLAUSE APPLIES TO THE STATES.

Respondent secondarily contends that this case should not be reviewed by this Court because the question whether the Excessive Fines Clause applies to the States was not decided by the court below and has never been addressed by this Court. (Brief in Opp. at 6). If anything, that is all the more reason for this Court to grant review in the present case.

Respondent states that he believes the Excessive Fines Clause applies to the States. (*Id.* at 7). Petitioner agrees, particularly given that the Cruel and Unusual Punishment Clause has been incorporated through the Fourteenth Amendment. *See Browning-Ferris Industries v. Kelco Disposal Inc.*, 492 U.S. 257, 284 (1989) (O'Connor, J., concurring in part and dissenting in part) (would hold that the Excessive Fines Clause applies to the States). This issue was before the court below[2] and was discussed at some length in the court's opinion. (Pet. for Cert. App. 14a-16a). As such, it can be decided by this Court because it necessarily is encompassed within the question presented by the petition for writ of certiorari. *See Yee v. City of*

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[2] The first question presented in the brief filed by respondent in the state appellate court read as follows: "Is the Excessive Fines Clause of the Eighth Amendment of the United States Constitution binding on the several States?"

Escondido, 503 U.S. 519, 535 (1992) ("statement of any question presented will be deemed to comprise every subsidiary question fairly included therein"); Sup. Ct. R. 14.1(a).

CONCLUSION

For the foregoing reasons and for the reasons stated in its petition for writ of certiorari, Somerset County, Maryland respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals of Maryland in this case.

Respectfully submitted,

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January 18, 1996